

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SAFECO INSURANCE COMPANY OF AMERICA	:
	:
Plaintiff,	:
	:
v.	:
	:
DEMATOS ENTERPRISES, INC., JOACQUIM	CIVIL ACTION
DEMATOS, DONNA DEMATOS, MARIA	No. 02-CV-2899 (BWK)
DEMATOS, ELIZABETH DEMATOS GRYS,	:
CHRISTOPHER PAUL GRYS,	:
	:
Defendants.	:

**PRETRIAL MEMORANDUM SUBMITTED
ON BEHALF OF PLAINTIFF, SAFECO INSURANCE COMPANY OF AMERICA**

**I. BRIEF STATEMENT OF THE NATURE OF THE ACTION AND
BASIS OF FEDERAL COURT SUBJECT MATTER JURISDICTION**

This case involves claims for breach of contract, and for a fraudulent conveyance of real estate.

Subject matter jurisdiction is based on 28 U. S. C. Section 1332, in that (a) the Plaintiff, Safeco Insurance Company of America (“Safeco”), is a resident of the State of Washington, and Defendants are citizens of the Commonwealth of Pennsylvania, and (b) the amount in controversy exceeds \$75,000.00.

II. BRIEF STATEMENT OF THE FACTS OF THE CASE

Safeco’s claims in this case have been brought against a corporation and three individuals [DeMatos Enterprises, Inc., Joacquim DeMatos, Donna DeMatos (his wife) and Maria DeMatos (Joaquim DeMatos’ mother) (hereafter collectively “the Indemnitor Defendants”)] on a General

Agreement of Indemnity for Contractors (hereafter "the Indemnity Agreement") they signed on December 9, 1998.

Based on the execution of that Indemnity Agreement, Safeco issued a number of Payment and Performance Bonds for construction projects on which DeMatos Enterprises, Inc. (the construction company owned and controlled by the Indemnitor Defendants), was the general contractor. In 2001, DeMatos Enterprises, Inc., defaulted on several of those contracts, as a result of which substantial claims were made against Safeco on its Payment and Performance Bonds. In Count I of its First Amended Complaint, Safeco seeks reimbursement from the Indemnitor Defendants, for its recoverable damages, losses and expenses (plus interest and attorney's fees) under the provisions of the Indemnity Agreement.

The other two claims alleged by Safeco --in Counts II and III of its First Amended Complaint--, are for violations of the Pennsylvania Uniform Fraudulent Transfer Act, 12 Pa. C. S. A. Section 5101 et seq. The Defendants on those claims are Maria DeMatos, her daughter, Elizabeth DeMatos Grys, and her son-in-law Christopher Grys. The basis for these claims is the undisputed fact that in early October, 2001, at a point when (a) DeMatos Enterprises, Inc., was not paying its bills as they came due, and (b) DeMatos Enterprises, Inc., and the Indemnitor Defendants were in default under the Indemnity Agreement, Maria DeMatos transferred free and clear title to her \$250,000.00+- home to her son-in-law and daughter, Christopher and Elizabeth Grys, for no consideration.

III. LIST OF MONETARY DAMAGES CLAIMED BY SAFECO

When Safeco's Motion for Partial Summary Judgment was filed on December 6, 2002, Safeco's damages consist of the following:

<u>DESCRIPTION</u>	<u>AMOUNT</u>
Amount Paid to them by Safeco on Payment Bonds ("Total Amount PBC Paid to Date" on Exhibit "A" to Ira E. Sussman Declaration Filed in Support of Safeco's Motion for Partial Summary Judgment)	\$612,552.23
Amount Paid to them by Safeco on Performance Bonds ("Completion Costs Paid to Date" on Exhibit "A" to Ira E. Sussman Declaration Filed in Support of Safeco's Motion for Partial Summary Judgment)	127,517.50
Attorney's Fees and Costs Incurred by Safeco (See summary sheets attached as part of Exhibit "A" to Ira E. Sussman Declaration Filed in Support of Safeco's Motion for Partial Summary Judgment)	147,051.50
Recoverable Interest (through November 20, 2002) on payments made to date*	12,298.53
Safeco's Estimated Post-November 20, 2002 losses and expenses -	<u>100,000.00</u>
Safeco's Total Recoverable Damages and Losses through November 20, 2002	<u>\$999,419.76</u>

*Interest on bills paid as of November 20, 2002, is accruing after November 20, 2002 at \$145.83 per day.

IV. NAMES AND ADDRESSES OF WITNESSES SAFECO INTENDS TO CALL AT TRIAL

A. Liability Witnesses

Joacquim DeMatos
2287 Black River Road
Bethlehem, PA 18015
(as on cross examination)

Steve Ferretti
Cashin Spinelli Heller & Ferretti, LLC
4170 Veterans Memorial Highway
Bohemia, NY 11716

Donna DeMatos
2287 Black River Road
Bethlehem, PA 18015
(as on cross examination)

Maria DeMatos
2291 Black River Drive
Bethlehem, PA 18015
(as on cross examination)

Elizabeth DeMatos Grys
2291 Black River Road
Bethlehem, PA 18015
(as on cross examination)

Christopher Grys
2291 Black River Road
Bethlehem, PA 18015
(as on cross examination)

John T. Durkin
263 South York Road
Hatboro, PA 19040
(as on cross examination)

Christopher P. Cashin
Cashin Spinelli Heller & Ferretti, LLC
4170 Veterans Memorial Highway
Bohemia, NY 11716

Keith McClure
Cashin Spinelli Heller & Ferretti, LLC
4170 Veterans Memorial Highway
Bohemia, NY 11716

Ira E. Sussman, Esquire
Safeco Surety
2800 W. Higgins Road, Suite 1100
Hoffman Estates, IL 60195

Dwight Teter
First National Insurance Company of America
1767 Sentry Parkway West, Suite 230
Blue Bell, PA 19422

Tim Schantz
National Washington Surety
Hellertown, PA 18055

Greg Bailey
First National Insurance Company of America
1767 Sentry Parkway West, Suite 230
Blue Bell, PA 19422

V. SCHEDULE OF EXHIBITS SAFECO EXPECTS TO OFFER AT TRIAL

Plaintiff's Exhibit No. 1 - December 9, 1998, General Agreement of Indemnity for Contractors

Plaintiff's Exhibit No. 2 - Spreadsheet showing five projects, Safeco Bond numbers, claim numbers, and amounts of Payment and Performance Bond claims paid to date (prepared by Cashin Spinelli Heller & Ferretti, LLC)

Plaintiff's Exhibit No. 3 - Chart showing claims submitted to and paid by Safeco on each of the five projects at issue

- Plaintiff's Exhibit No. 4 - Listing of bills/invoices paid by Safeco, segregated by Bond Number for each of the five projects for which claims were made against Safeco, showing amounts paid, date of payment, and name of payee
- Plaintiff's Exhibit No. 5 - Summary of Admissions contained in Defendants' Answer and Affirmative Defenses to Plaintiff's First Amended Complaint
- Plaintiff's Exhibit No. 6 - Breakdown of Safeco's damages and losses sustained in this litigation, including accrued interest on payments made
- Plaintiff's Exhibit No. 7 - July 8, 2002, letter from Kevin T. Fogerty, Esquire, to Douglas Smillie, Esquire
- Plaintiff's Exhibit No. 8 - July 31, 2002, letter from Kevin T. Fogerty, Esquire, to Douglas Smillie, Esquire
- Plaintiff's Exhibit No. 9 - August 8, 2002, letter from Jamie P. Clare, Esquire, to Douglas J. Smillie, Esquire
- Plaintiff's Exhibit No. 10 - Documents generated from DeMatos Enterprises, Inc.'s computer discs, including Vender Ledgers, Check Register, Payables Register, Receivables Register, and Cash Receipts Journal
- Plaintiff's Exhibit No. 11 - Bankruptcy Schedules and Statement of Financial Affairs filed on behalf of DeMatos Enterprises, Inc., in Bankruptcy Case No. 02-20713
- Plaintiff's Exhibit No. 12 - Portions of DeMatos Enterprises, Inc.'s Corporate Kit, including Share Certificates identifying stockholders, and Minutes identifying directors and officers of the corporation
- Plaintiff's Exhibit No. 13 - U.S. Corporation Income Tax Return for DeMatos Enterprises, Inc. (Form 1120) filed for the corporation's fiscal/calendar year 2000
- Plaintiff's Exhibit No. 14 - Forms W-2 for 2001 and 2002 for Joaquim DeMatos, Donna DeMatos and Maria DeMatos
- Plaintiff's Exhibit No. 15 - October 9, 2001, Agreement between Maria DeMatos (party of the first part) and Elizabeth DeMatos Grys and Christopher Paul Grys (party to the second part), regarding conveyance of 2291 Black River Road, Lower Saucon Township, Northampton County, PA

- Plaintiff's Exhibit No. 16 - December 15, 2001, letter (no addressee) signed by Maria L. DeMatos, confirming her intention of a \$20,000.00-per-year gift to her daughter and son-in-law for forgiveness of debt
- Plaintiff's Exhibit No. 17 - Maria DeMatos' Statements of Personal Financial Condition dated March 31, 2000, and July 31, 2002
- Plaintiff's Exhibit No. 18 - Joaquim DeMatos and Donna DeMatos' Statement of Personal Financial Condition dated July 31, 2002
- Plaintiff's Exhibit No. 19 - Response of John T. Durkin & Co., to Subpoena dated January 22, 2003, item No. 6, including related request for production of documents contained within that Subpoena
- Plaintiff's Exhibit No. 20 - September 27, 2001, Interoffice Correspondence from Dwight D. Teter to Ira Sussman
- Plaintiff's Exhibit No. 21 - September 20, 2001, fax from Tim Schantz to Greg Bailey/Dwight Teter
- Plaintiff's Exhibit No. 22 - October 8, 2001, Interoffice Correspondence from Greg Bailey to Dwight Teter
- Plaintiff's Exhibit No. 23 - October 19, 2001, e-mails between/among Dwight Teter/Ira Sussman and Greg Bailey
- Plaintiff's Exhibit No. 24 - February 19, 2002, Interoffice Correspondence from Ira Sussman to Blake Wilcox/Doug Dearie
- Plaintiff's Exhibit No. 25 - February 19, 2002, Interoffice Correspondence from Ira Sussman to Teter/Bailey/Wilcox/Dearie
- Plaintiff's Exhibit No. 26 - February 21, 2002, e-mails between/among Dwight Teter and Ira Sussman
- Plaintiff's Exhibit No. 27 - September 25, 2001, letter from David H. Rattigan, Esquire, to DeMatos Enterprises, Inc., attention Joaquim L. DeMatos
- Plaintiff's Exhibit No. 28 - October 2, 2001, letter from David H. Rattigan to First National Surety and Timothy W. Schantz, agent
- Plaintiff's Exhibit No. 29 - October 1, 2001, letter from Michael P. Postupak to First National Surety
- Plaintiff's Exhibit No. 30 - November 8, 2001, letter from Ira Sussman, Esquire, to Joaquim DeMatos (re: Postupak Painting)

Plaintiff's Exhibit No. 31 - November 23, 2001, letter from Joaquim DeMatos to Ira Sussman at Safeco (re: Postupak Painting)

Plaintiff's Exhibit No. 32 - September 25, 2001, letter from Kevin J. Gough to First National Insurance Company, attention Dwight Teter

Plaintiff's Exhibit No. 33 - October 2, 2001, letter from Kevin J. Gough, of Alan Kunsman Roofing and Siding, Inc., to DeMatos Enterprises, Inc., attention Jack DeMatos

Plaintiff's Exhibit No. 34 - October 4, 2001, letter from Ira Sussman to Kevin J. Gough, of Alan Kunsman Roofing and Siding, Inc.

Plaintiff's Exhibit No. 35 - October 4, 2001, letter from Ira Sussman to DeMatos Enterprises, Inc. (re: Alan Kunsman Roofing and Siding, Inc.)

Plaintiff's Exhibit No. 36 - November 1, 2001, letter from Rick Dombroski at Vaughan Co., Inc., to First National Surety/Safeco Insurance (attention Ira Sussman)

Plaintiff's Exhibit No. 37 - November 8, 2001, letter from Ira Sussman to Joaquim DeMatos, President of DeMatos Enterprises, Inc., regarding Vaughan Co., Inc.

Plaintiff's Exhibit No. 38 - August 6, 2001, letter from Jeannie Cooper, of Ford Hall Company, Inc., to First National Surety

Plaintiff's Exhibit No. 39 - September 5, 2001, letter from Ira Sussman to Joaquim DeMatos, President of DeMatos Enterprises, Inc., regarding Ford Hall Company, Inc.

Plaintiff's Exhibit No. 40 - May 24, 2001, letter from Carl J. Malkiewicz, of Andritz-Ruthner, Inc., to Jack DeMatos, of DeMatos Enterprises, Inc.

Plaintiff's Exhibit No. 41 - June 1, 2001, letter from Carl J. Malkiewicz, of Andritz-Ruthner, Inc., to Jack DeMatos, of DeMatos Enterprises, Inc.

Plaintiff's Exhibit No. 42 - July 20, 2001, letter from Debra B. Zink, Esquire, corporate counsel at Andritz-Ruthner, Inc., to First National Surety

Plaintiff's Exhibit No. 43 - August 10, 2001, letter from Ira Sussman to Joaquim DeMatos, at DeMatos Enterprises, Inc., regarding Andritz-Ruthner, Inc.

Plaintiff's Exhibit No. 44 - September 26, 2001, letter from Debra B. Zink, Esquire (Andritz-Ruthner, Inc.'s in-house counsel) to Ira Sussman

Plaintiff's Exhibit No. 45 - October 10, and 12, 2001, e-mails between/among Ira Sussman, Gregory Bailey and Douglas Dearie

Plaintiff's Exhibit No. 46 - October 17, 2001, letter from Ira Sussman to Joacquim DeMatos, regarding Andritz-Ruthner, Inc.

Plaintiff's Exhibit No. 47 - October 19, 2001, e-mail from Dwight Tetter to Ira Sussman, et al., regarding Andritz-Ruthner, Inc.

VI. ESTIMATE OF THE NUMBER OF DAYS REQUIRED FOR TRIAL

Three days (although the trial could be shorter if the Court grants all or a substantial portion of Safeco's Motion for Partial Summary Judgment, which is presently pending).

VII. SPECIAL COMMENTS

As mentioned previously, disposition of Safeco's pending Motion for Partial Summary Judgment may substantially narrow the issues remaining to be submitted at trial.

Respectfully submitted,

LAW OFFICES OF KEVIN T. FOGERTY

By: _____
Kevin T. Fogerty, Esquire
Attorneys for Plaintiff, Safeco Insurance
Company of America

CERTIFICATE OF SERVICE

I, Kevin T. Fogerty, Esquire, counsel for Plaintiff, Safeco Insurance Company of America in this proceeding, hereby state and certify that on Tuesday, April 1, 2003, I served by first-class mail, a true and correct copy of Pretrial Memorandum Submitted On Behalf Of Plaintiff, Safeco Insurance Company Of America, upon the following:

Douglas Smillie, Esquire
Fitzpatrick, Lentz & Bubba, P.C.
4001 Schoolhouse Lane
P.O. Box 219
Center Valley, PA 18034-0219
Attorneys for Defendants
Joacquim DeMatos, Donna DeMatos and Maria DeMatos
Elizabeth DeMatos Grys and Christopher Paul Grys

Date: April 1, 2003

Kevin T. Fogerty, Esquire